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In the Supreme Court of the United States

OCTOBER TERM, 1985

GARY JACKSON, a/k/a ROE

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Confrontation Clause bars the prosecution from introducing statements falling within the co-conspirator exception to the hearsay rule (Fed. R. Evid. 801 (d) (2) (E) where the prosecution fails to establish that the declarant is unavailable to testify at trial.

2. Whether the Compulsory Process and Confrontation Clauses of the Sixth Amendment and the Due Process Clause of the Fifth Amendment were violated by the prosecution's refusal to assist in the production of a confined witness and the trial court's failure to act upon the Defendant's application for a Writ of Habeas Corpus and Testificandum.

3. Whether the Due Process Clause requires that a hearing be held outside the hearing of the jury to determine the admissibility of various admissions by a co-conspirator in a proceeding separate and apart from the jury trying guilt or innocence.

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OCTOBER TERM, 1985

GARY JACKSON, a/k/a ROE, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Defendant, Gary Jackson a/k/a Roe, by and through Counsel, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App., *infra*) is reported at 757 F.2d 1486.

JURISDICTION

The judgment of the Court of Appeals was entered on March 21, 1984. The order denying rehearing was entered on May 30, 1985 (App., *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Fifth Amendment states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases rising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Rule 801(d) of the Federal Rules of Evidence provides in pertinent part:

> A statement is not hearsay if—
>
> * * * * *

(2) * * * The Statement is offered against a party and is * * *, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Rule 104(a) of the Federal Rules of Evidence provides:

Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Rule 104(c) of the Federal Rules of Evidence provides:

Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

STATEMENT

On January 4, 1984, a grand jury in the Eastern District of North Carolina returned a five count bill indictment against the Defendant, Gary Jackson, also known as "Roe". The indictment alleged that "from on or about the 7th day of April, 1983, and continuously thereafter up to and including the 29th day of November, 1983, . . .the Defendant, willfully and knowingly did combine, conspire, confederate and agree to together with Michael Lynn Thompson. . .and with diverse other persons. . ." to possess marijuana with intent to distribute, and to distribute marijuana, and to illegally acquire and possesss food stamps.

In addition to the conspiracy offense, the Defendant was charged with knowing acquisition and possession of the food stamps without being authorized to do so under law or regulations, unlawful possesson of marijuana with

the intent to distribute it, distribution of marijuana, and the use of a communications facility to transact unlawful disposition of a controlled substance.

Defendant, Michael Lynn Thompson, was also charged in a separate indictment with conspiracy involving different dates. The government filed a motion to join the indictments for trial which was allowed.

A pretrial conference was conducted. At that conference, Christopher B. Godwin, attorney for the Defendant, Gary Jackson, appeared. Also, a conference was conducted involving counsel for Defendant, Michael Thompson. No record of any sort was taken or permitted to be made of the conference except the notes of the attorneys for the defendants.

Defense counsel was not advised by the government at the conference or appreciably prior to trial that Preston Lee Jackson, Defendant's nephew, would be alleged or contended to be a co-conspirator. Counsel was not told his statements would be offered as vicarious, co-conspirator admissions.

Prior to trial the Defendant filed a request for an evidentiary preliminary hearing to determine the admissibility of co-conspirator statements. Recognizing the Defendant's request as one for "James" hearing, the magistrate denied the motion on the ground that the Fourth Circuit has not yet adopted the *James* decision. The trial court similarly denied this motion for a preliminary determination on the record of admissibility.

On January 27, 1984, the Defendant served the prosecutor, with various motions. Among those motions was motion for a bill of particulars seeking, *inter alia*, the names and identities of any persons alleged to have been members of the conspiracy and a statement of the manner or means by which the conspiracy was contended to have occurred.

The government responded to the Defendant's motion

for a bill of particulars with a four page response in which it contended that the government had "supplied [defense counsel] with every essential detail regarding the charges against the Defendant." The government, further asserted, that the request for a bill of particulars was intended to obtain discovery and submitted "that the indictment . . . set out with clarity and specificity all of the particulars and material facts necessary to enable the Defendant to understand the charges against him . . ."

Without conducting a hearing to resolve the conflict between the government's assertions with respect to discovery and those of the Defendant, the magistrate denied the motion for a bill of particulars. Oddly, the order denying the motion for a bill of particulars was not received by defense counsel, and defense counsel raised the bill of particulars question before the court on February 22, 1984, prior to the commencement of the evidentiary portion of the trial. The trial court made no inquiry, either, at that time as to whether the conflict still existed between the government and defense counsel as to the discovery provided but simply, "based on the finding of the magistrate", denied the motion for a bill of particulars, including the request for the identities of persons alleged to be co-conspirators.

Jury selection commenced on February 21, 1984, in Wilmington, North Carolina. On February 27, 1984, the trial actually began with the presentation of evidence.

Immediately prior to beginning the evidentiary phase of the trial, defense counsel made a motion in limine to exclude statements by persons not specifically charged or alledge to be co-conspirators. The motion was denied.

Additionally, at the trial, Defendant objected to hearsay statements of Preston Lee Jackson upon the ground that their introduction denied Defendant his Sixth Amend-

ment right to confrontation and compulsory process and his guarantee of due process of law. After jury selection, and prior to the evidentiary portion of the trial beginning, defense counsel contacted the prosecutor's office to request assistance in obtaining the presence of Preston Lee Jackson at trial. That request was refused and Defendant was told that if he desired to have Preston Lee Jackson present, he would have to file a petition to do so. Defendant filed such a petition on the Friday prior to trial and brought the petition to the attention of the trial court. Rather than acting on the petition, the court sustained the Defendant's objection to the testimony, but later allowed the testimony to be introduced in the trial.

At trial, the government sought to introduce, and was successful, over the Defendant's objections and motions to strike, in introducing into evidence acts and declarations of Preston Lee Jackson to prove the Defendant's participation in the alleged conspiracy. Additionally, the government introduced evidence of the Defendant's actions and those of Preston Lee Jackson and Michael Thompson, as well as Preston Lee Jackson's statements on dates not alleged in the indictment, particularly, February 22, March 15, March 16, March 31, and April 1, 1983, of which the Defendant was not advised and did not have notice.

On the afternoon of February 29, 1984, the jury returned a verdict of guilty as to the Defendant, Jackson, on all counts. On appeal from the conviction, the Fourth Circuit Court of Appeals held that disclosure of the co-conspirator's statements should have been made, but ruled that neither the denial of the motion in limine, the request for a preliminary determination of admissibility outside the presence of the jury, and the motion for bill of particulars, nor the failure to act on the application for the writ of *habaes corpus ad testificandum* was an abuse of discretion. Similarly,

the government's failure to produce the co-conspirator or to show his unavailability was not such a violation as to constitute reversible error.

REASONS FOR GRANTING THE PETITION

This case presents a question of great practical importance to our criminal justice system. The conflict between the constitutionally mandated Confrontation Clause and the use of co-conspirator declarations is often very real. The interpretation and resolution of this conflict has sharply divided the Courts of Appeals and resulted in widely divergent and inconsistent opinions. This divergence of results can most recently be shown through this case and another, *United States v. Inadi,* 748 F.2d 812 (3d Cir. 1985), *cert. granted,* _____ U.S. _____ 53 U.S.L.W. 2318, No. 84-1580 (1985); wherein the Third Circuit, reversed a Defendant's conviction due to the government's failure to show that a co-conspirator was unavailable to testify and thus that his out-of-court statements were admissible.

In this case, *United States v. Jackson,* 757 F.2d 1486 (4th Cir. 1985), the Fourth Circuit Court of Appeals upheld the use of an absent co-conspirator's statements despite a showing that he was confined in a federal prison. The position of the Fourth Circuit conflicts with the recent opinion of the Supreme Court in *Ohio v. Roberts,* 448 U.S. 56 (1980); and that of the Ninth Circuit in *United States v. Ordonez,* 737 F.2d 793 (9th Cir. 1984).

In *United States v. Peacock,* 654 F.2d 339 (5th Cir. 1981); *cert. denied,* 464 U.S. 965 (1983). The Fifth Circuit reasoned that proof of the declarant's unavailability may be a constitutional prerequisite for admission of the co-conspirator's statements. The Court, however, found that such a showing had been made.

Other courts have concluded that statements which fall

within the co-conspirator rule satisfy the Confrontation Clause. *E.g., United States v. Kendall,* 665 F.2d 126 (7th Cir. 1981) *cert. denied,* 455 U.S. 1021 (1982); *United States v. McManus,* 560 F.2d. 747 (6th Cir. 1977); *cert. denied,* 434 U.S. 1047 (1978); *Ottomano v. United States,* 468 F.2d 269 (1st Cir. 1972) *cert. denied,* 409 U.S. 1128 (1973).

The Confrontation Clause does impose a requirement of showing a declarant's unavailability prior to the prosecution using his statements against the Defendant. *Ohio v. Roberts, supra; Mancusi v. Stubbs,* 408 U.S. 204 (1972); *Barber v. Page,* 390 U.S. 719 (1968).

In the case now before the Court, the Fourth Circuit allowed into evidence the alleged co-conspirator's statements despite the showing to the trial court that the co-conspirator was incarcerated in a federal prison. The prosecution had no intention of calling him to the stand, stating that fact to defense counsel immediately prior to trial. Upon learning at the time of trial that the prosecution was not calling the co-conspirator, the Defendant attempted to petition for a writ of *habeas corpus ad testificadum.* The trial court declined to grant the writ.

Quite naturally, the co-conspirator's statement is likely to be more presentable and palatable to a jury than the witness in the flesh. These niceties pale into insignificance, however, when compared to the mandate of the Confrontation Clause of the Sixth Amendment. Absent a showing of unavailability, which is not a great burden to the prosecution, the government should produce the declarant for cross examination. His production at trial would aid in the search for truth. To allow the prosecution to proffer statements, without requiring any showing of unavailability or governmental attempt to produce the declarant, does little to serve the cause of justice, particularly where as is shown in the record here, the objection is based on the fact that

the declarant was available and in the custody of the government.

2. In this case, as "in all criminal prosecutions, the accused . . . [was entitled to] enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor. . .". United States Constitution, amendment VI. The denial of the opportunity to face and confront the maker of inculpatory statements and the failure to afford the Defendant the means to procure a confined witness violates these Sixth Amendment rights. Additionally, the conduct of the prosecution in concealment or in making a witness unavailable violates the defendant's rights to due process of law. *See, Clark v. Blackburn,* 632 F.2d 531 (5th Cir. 1980).

While the Defendant does not contend that the right to confrontation is always coextensive with the hearsay rule and its exceptions; *see, e.g., Dutton v. Evans,* 400 U.S. 213 (1970); or that the right to complusory process is absolute; *see, e.g., Hoskins v. Wainwright,* 440 F.2d 69 (5th Cir. 1974); the Defendant asserts that these rights mandate a careful examination in each case to insure that the Defendant's right of confrontation is not abridged. *See, e.g., United States v. Puco, 476 F.2d 1099. (2d Cir. 1973), cert. denied,* 414 U.S. 844 (1973). *See also, United States v. Wright,* 588 F.2d 31, 38 (2d Cir. 1978) (unless a statement has sufficient indicia of reliability, then the prosecution should not be permitted to introduce out of Court statements into evidence under *Dutton* where the declarant is available and the Defendant has not had an opportunity to cross-examine).

The confrontation clause of the Sixth Amendment at a minimum was adopted to prevent the use of *ex parte* extrajudicial declarations in lieu of available witnesses in criminal trials. *Mattox v. United States,* 156 U.S. 237, 242 (1895). The clause affords a defendant the opportunity to

face his accuser, and allows the judge and jury to view the witness' demeanor to aid them in determining the reliability of the testimony. *Id.* at 242-43. *See also, Barber v. Page,* 390 U.S. 719, 722-25 (1968) (reversed armed robbery conviction where transcript of accomplice's confession was read at defendant's trial and state did not make good faith effort to produce accomplice); *Douglas v. Alabama,* 380 U.S. 415, 418 (1965) (reversed conviction for murder where extrajudicial confession of accomplice was read before jury and defendant unable to confront accomplice through cross-examination); *Pointer v. Texas,* 380 U.S. 400, 406-09 (1965) (reversed robbery conviction because defendant was denied the opportunity to confront an adverse witness when deposition of major witness was used by prosecution at defendant's trial).

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present the defendant's version of the facts as well as the prosecutions to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. *Washington v. Texas,* 388 U.S. 14, 19 (1967).

Deliberate concealment of a material witness is a deprivation of constitutional rights. *Lockett v. Blackburn,* 571 F.2d 309 (5th Cir. 1978), *cert. denied,* 439 U.S. 873 (1979) (United States Attorney's Office purchased airline tickets for witness and a police officer gave the two witnesses $130.00 in spending money, after which the witnesses left); *Freeman v Georgia,* 599 F.2d 65 (5th Cir. 1979), *cert. denied,* 444 U.S. 1013 (1980) (without approval by superiors, a police officer deliberately concealed a key witness, later marrying the witness). In such cases, a conviction cannot stand

and a new trial must be granted because the verdict was obtained without affording the defendant due process of law. Similarly, even the negligent concealment of a material witness or the prosecution's prevention of acquisition of such a witness at trial may constitute a denial of constitutional rights. *Id. Cf., Hernandez v. Estelle,* 674 F.2d 313, 317 (5th Cir. 1981) (by implication).

In *Motes v. United States,* 178 U.S. 458 (1900), the state introduced evidence of the prior recorded testimony of a witness that the prosecution did not produce at the trial to testify. The absent witness had been present within the territory. The government had, in fact, taken him into custody as a material witness before placing him in the custody of another witness from whom he escaped. Bacause the prosecution could have produced the witness had it maintained custody, pursuant to the court's ordinary process, the state was found to be negligent in failing to use means readily at its disposal to bring the witness into open court. Accordingly, the court held that the use of the out-of-court statement violated the defendant's right of confrontation. *Id.*

The decision of the Fifth Circuit Court of Appeals in *Hernandez v. Estelle,* 674 F.2d 313 (5th Cir. 1981), conflicts with the opinion of the Fourth Circuit Court of Appeals here. There, the state concealed its own witness and informant, Levine. The appellate court was "in the difficult position of determining the value of Levine's testimony without the benefit of the testimony itself. No one [knew]. . .what Levine would say should he suddenly appear." 674 F.2d at 316. However, looking at the circumstances of the record, the action of the prosecution and the possible reward for secreting a witness, the Court reasoned that "prejudice results when the absent witness' alleged testimony, circumstantially derived from and evaluated in context of the

entire record, would create a reasonable doubt of the defendant's guilt that did not otherwise exist." *Id.*

Neither the decisions from the United States Supreme Court nor other circuits have imposed a requirement that a defendant whose rights have been violated must also demonstrate that he could have impeached the statements of the witness to be confronted if he had been present, or that the secreted witness would have exculpated the defendant, as the Fourth Circuit held in this case. *See,* cases cited at page 10, *supra.* In the present case, the government had Preston Lee Jackson, an essential witness, in custody when it became clear that the government intended to rely upon the hearsay statements of Preston Lee Jackson. Defense counsel contacted the United States Attorney's Office. In the course of that discussion, defense counsel was informed that "Preston Lee Jackson was, in fact, in the custody of the United States. . .and requested the assistance [of the U.S. Attorney's Office] in obtaining the presence of Preston Lee Jackson at this trial. [Defense counsel was] informed that it was [first Assistant U.S. Attorney] Mr. McCollough's position" that his office would not assist in obtaining Jackson and that if the Defendant wanted Preston Lee Jackson present to confront him, he would have to file a Petition to do so. Defense counsel then filed a petition for writ of *habeas corpus ad testificandum.*

The trial court failed to act upon the petition or even to conduct a hearing upon its necessity and the prosecutor's unwillingness to make the confined witness available in violation of the Defendant's constitutional rights. *See, Shirley v. North Carolina,* 528 F.2d 819 (4th Cir. 1975) (holding that refusal to grant continuance to secure presence of essential witness confined in stockade by military authorities violated compulsory process clause of the sixth amendment) (denial of continuance motion). Clearly, the Defendant's

right to compulsory process was denied and the actions of the prosecutor and inaction of the court ripened into a due process denial.

3. Three requirements must be established for the admission of a statement of an alleged co-conspirator. *United States v. Weiner,* 578 F.2d 757 (9th Cir. 1978). Before such a declaration can properly be admitted, the court must make a preliminary determination whether the requirements for admissibility have been met. *United States v. Stroupe,* 538 F.2d 1063, 1065 (4th Cir. 1976).

Admittedly, no error is committed where the trial court makes a clear determination in the record, supported by a fair preponderance of independent evidence, that the conspiratorial declarations are admissible. *Cf., United States v. Talbert,* 706 F.2d 464, 468 (4th Cir. 1983) (no error to allow conspiratorial admission where sufficient independent evidence of conspiracy was presented and the trial court made preliminary determination of admissibility). *Compare, United States v. Stroupe,* 538 F.2d 1063, 1065 (4th Cir. 1976); with *United States v. Kelly,* 718 F.2d 661, 663 (4th Cir. 1983). A number of other circuits have held that without an "explicit determination for the record" where the Defendant makes a request for such a determination, regarding the admissibility of the statement, the conviction of the defendant should be reversed. *United States v. Bell,* 573 F.2d 1040, 1044 (8th Cir. 1978) (holding reversal not required on the facts where no request was made). *See, United States v. Williams,* 604 F.2d 1102 (8th Cir. 1979); *United States v. Macklin, 573 F.2d 1046 (8th Cir. 1978); United States v. Hansen,* 569 F.2d 406 (5th Cir. 1978).

In *United States v. Radeker,* 664 F.2d 242 (10th Cir. 1981), the Court of Appeals reversed the defendant's conviction because the trial court admitted the conspiratorial statement without first determining on the record the

elements of Rule 801(d)(2)(E). The Court pointed out that "such statements could be admitted at the close of all evidence and prior to submission of the case to the jury *only if* the trial judge determines that the requisites for admissibility have been met." *Id., quoting from United States v. Petersen,* 611 F.2d 1313 (10th Cir. 1979), *cert. denied,* 447 U.S. 905 (1980), *citing, United States v. Andrews,* 585 F.2d 961 (10th Cir. 1978).

The United States Court of Appeals for the Third Circuit reversed a Defendant's conspiracy conviction where the government failed to make a showing either preliminarily or before the jury of a co-conspirator's unavailability as a requisite to introduction of such admissions at trial in *United States v. Inadi,* 748 F.2d 812 (1984), *cert. granted* _____ U.S. _____, 53 U.S.L.W. 2318, no. 84-1580 (1985). The Court held that the failure to make such a showing and unavailability required reversal because tape recordings were admitted without an adequate determination of this foundational requisite.

In *United States v. Ziegler,* 583 F.2d 77 (2d Cir. 1978), the court reversed a conviction in which a government agent was permitted to repeat on the witness stand the statements made to him by an informer purporting to embody admissions made by the defendant in conversations with the informer. The failure to make a preliminary finding concerning the elements necessary for the foundation to admit co-conspirator's declarations was erroneous. The court reasoned that "[t]his was error and harmful since it foreclosed Appellant from the possibility of obtaining a preliminary determination [of admissibility]. . . ." *Id.* at 81.

The purpose of the rules governing preliminary determinations of the admissibility of such evidence is to prevent prejudice and to "avoid the danger that the jury might convict on the basis of these statements without first deal-

ing with the admissibility question." *United States v. James,* 590 F.2d 575, 579 (5th Cir. 1979), *cert. denied,* 442 U.S. 917 (1979).

> It was this same danger which motivated the Supreme Court to hold in *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), that 'a criminal defendant is entitled to have a 'reliable and clearcut determination of the voluntariness of [his] confession, including the resolution of disputed facts upon which the voluntariness issue may depend, made by someone other than the jury which is to determine his guilt or innocence....
>
> The admissibility of co-conspirators' declarations in a conspiracy trial, however, does pose problems precisely because they are relevant. *Such evidence endangers the integrity of the trial* because the relevance and apparent probative value of the statements may be so highly prejudicial as to the color other evidence even in the mind of a conscientious juror, despite instructions to desregard the statements or to consider them conditionally.

Id. (emphasis added).

In *Lego v. Twomey,* 404 U.S. 477 (1972), this court sanctioned the practice with respect to confessions of pretrial hearings to have a judge hear the evidence from both sides and, using the preponderance of the evidence standard, to determine whether the confession is admissible. Due process of law, apart from the requirements of the Federal Rules of Evidence, gices the defendant the right to a determination of admissibility before the jury can hear such statements. *Jackson v. Denno,* 378 U.S. 368 (1964).

Similarly, a denial of a preliminary hearing on admissibility of statements such as those in this case without affording any opportunity for a hearing of any sort, even

as a part of a *voir dire* at trial, should be condemned as a denial of due process. Fundamental fairness and the interests of justice require that when an accused requests or if an accused is a witness on the issue, then a hearing should be conducted outside the presence of the jury on matters other than the suppression of confessions, specifically, the admissibility of vicarious admissions.

In this case, the defendant, Jackson, requested an independent hearing upon his motion in limine prior to trial. The magistrate in ruling on the motion ruled that "[e]ssentially, the defendant is requesting a 'James' hearing." The magistrate ruled, however, and the district court later adopted the magistrate's decision, that since "the Fourth Circuit has not adopted the *James* decision. . .the pre-trial motion for a hearing out of the presence of the jury as to the admissibility of co-conspirator's statements [was]. . .denied."

The opinion of the Fourth Circuit Court of Appeals in this case follows the same reasoning and follows *United States v. Hines,* 717 U.S. 1481, 1488 (4th Cir. 1983). Such a ruling would not be appropriate, even though a particular circuit has not adopted the rule of *United States v. James,* 590 F.2d 575 (5th Cir. 1979). *James* was decided on the basis and authority of the Federal Rules of Evidence and neither *James* nor *Hines* nor other cases address or dispose of this due process contention.

Where a defendant challenges the use of a statement, which may have substantial prejudicial impact, then he has a constitutional right to "an adequate evidentiary hearing productive of reliable results. . ." with respect to the admissibility of the statement. *Jackson v. Denno,* 378 U.S. 368, 394 (1964). The need for such an evidentiary hearing outside the presence of the jury is more than a merely technical procedural, evidentiary difficulty. "These apparently

technical problems are of enormous significance in the conspiracy trial. Conspirator statements are often the central evidence in the case." Kessler, *The Treatment of Preliminary Issues of Fact in Conspiracy Litigation: Putting the Conspiracy Back into the Co-conspirator Rule,* 5 Hofstra L. Rev. 77, 79 (1976).

In *Jackson v. Denno, supra,* the court ruled that because of the substantial danger of prejudice and the seriousness of the consequences of the prescribed procedure for admitting confessions and determining their admissibility, at the very least, a full evidentiary hearing is necessary to determine the factual context in which the statement was made. *Id.* at 392. Similarly, in connection with co-conspirators statements, the Fifth Circuit Court of Appeals, in *United States v. James,* 590 F.2d 575, 581-82 (5th Cir.) (en banc), *cert. denied* 442 U.S. 917 (1979), reasoned that

> [b]oth because of the 'danger' to the defendant if the statement is not connected and because of the inevitable serious waste of time, energy and efficiency, when a mistrial is required in order to obviate such danger, we conclude that the present procedure warrants the statement of a proffered order of proof in such case. The District Court should, whenever reasonably practicable, require the showing of a conspiracy and of the connection of the defendant with it before admitting declarations of a co-conspirator.

If preliminary hearings on the admissibility of confessions must always be conducted outside the hearing of the jury under *Jackson v. Denno,* 378 U.S. 368 (1964), and as required by Fed. R. Evid. 104(c), then due process and fundamental fairness require that hearings on co-conspirator's statements which are, as equally devastating as a confession, should be held outside the hearing of the jury. In the present case, not only were statements alleged to have been

made to facilitate illegal transactions, but the government agents testified to declarations of Preston Lee Jackson that the defendant was involved in illegal transactions. Such declarations were tantamount to a vicarious confession.

Here, the defendant also contended that he was not afforded his right to testify at any hearing and to present his version or contentions with respect to a lack of the elements necessary to establish a foundation to admit co-conspirator's statements. Due process entitles a defendant to an opportunity to testify or to present evidence on the issue of admissibility of statements. *Luck v. United States,* 348 F.2d 763 (D.C. Cir. 1965) (holding that the factual basis of a voluntariness objection with respect to a defendant's statement should be explored out of the jury's presence). In that hearing in the jury's absence, both sides, the government and the defendant, should be afforded an opportunity to present their versions. *Id. See, United States v. Ciampaglia,* 628 F. 2d 632, 638 (1st Cir. 1980), *cert. denied,* 449 U.S. 1038 (1980) (recognizing that the preponderance test for admissibility of conspiratorial admissions "implicitly anticipated that the defendant's evidence would be taken into consideration"). Further, the defendant argues that he was deprived of the right and opportunity to tender such testimonial proof to the court without giving up his right to remain silent and without subjecting himself to cross-examination before the jury. *Cf., Simmons v. United States,* 390 U.S. 377 (1968) (search and seizure issues).

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

RONNIE M. MITCHELL
Counsel of Record
JAMES R. PARISH
Attorney

Appendix

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-5156

UNITED STATES OF AMERICA, APPELLEE

v.

GARY JACKSON, a/k/a "ROE", APPELLANT.

Appeal from the United States
District Court for the
Eastern District of North Carolina,
at Fayetteville,
W. Earl Britt, Chief District Judge.

(CR 84-12-01-CR-3)

Argued: December 3, 1984.

Decided: March 21, 1985

Before PHILLIPS and WILKINSON Circuit Judges,
and BUTZNER, Senior Circuit Judge.

Ronnie M. Mitchell (Christopher B. Godwin; Harris, Sweeny & Mitchell on brief) for appellant; Francis J. Martin, Department of Justice (Samuel T. Currin, United States Attorney on brief) for Appellee.

PHILLIPS, Circuit Judge:

Gary Jackson appeals from his convictions in the United States District Court for the Eastern District of North Carolina of conspiracy to illegally possess drugs with intent to distribute and to unlawfully acquire and possess food coupons, 18 U.S.C. § 371; various drug and illegal food stamp offenses, 6 U.S.C. § 2024(b), 21 U.S.C. § 841(a)(1); and use of a telephone in the scheme, 21 U.S.C. §§ 843(b) and (c). Finding no prejudicial error, we affirm.

I

On the conspiracy count the government offered proof that Hackson participated in the conspiracy with Preston Jackson, Gary's nephew, and Michael Thompson, another relative, from April 7, 1983, until November 29, 1983. The district court admitted into evidence out of court statements implicating Jackson made by Preston Jackson and Thompson to government agents prior to April 7 concerning drug, gun and food stamp deals arranged by the undercover agents. The government also presented a taped phone conversation between agents and Gary Jackson arranging a deal for April 7, evidence that Preston Jackson and Thompson consummated deals outside Gary Jackson's house and evidence that Gary Jackson backed out of an arranged deal on April 1. The government did not establish face to face dealings between Gary Jackson and undercover agents.

Jackson first argues for reversal because the district court followed inadequate procedures in admitting the ut of court statements of Preston Jackson and Thompson made to government agents under Fed. R. Evid. 801(d)(2)(E), which makes co-conspirator's statements during the course of and in furtherance of the conspiracy nonhearsay that is admissible agaainst the defendant conspirator. Jackson contends that the court must conduct an on the record, away from the jury hearing to determine whether the government presented sufficient independent

evidence of the conspiracy before invoking the co-conspirator statement rule. Jackson also argues that the trial judge erred in not making an explicit ruling that sufficient independent evidence exists and in not submitting the admissibility issue to the jury.

Jackson is correct that the court may admit co-conspirator's out of court statements under Rule 801(d)(2)(E) only is the government presents substantial independent non-hearsay evidence of the conspiracy and Jackson's connection to it. *United States v. Stroupe,* 583 F2d 1063, 1065 (4th Cir. 1976). However, as we have recently held, the trial court need not hold an on the record, away from the jury hearing to determine the admissibility question. *United States v. Hines,* 717 F.2d 1481, 1488, (4th Cir. 1983). Moreover, the trial judge need not make an explicit ruling that sufficient independent evidence of the conspiracy exists before admitting the hearsay. Instead, the court may admit the hearsay and later declare a mistrial, or, when appropriate, exclude the hearsay and give a limiting instruction, if the government fails to connect up with independent evidence. *See Bruton v. United States,* 391 U.S. 123, 135 (1068); *Hines,* 717 F.2d at 1488. Finally, this court has rejected Jackson's argument that thejury should make the admissibility determination, *Id.* Hence, Jackson's allegations of error in the procedure followed by the district court to invoke Rule 801(d)(2)(E) have no merit.

II

Jackson next argues that the district court erred in admitting our of court statements of co-conspirators made in March because the indictment charges him with conspiracy beginning on April 7. Hearsay statements are admissible under Rule 801(d)(2)(E) even if no formal charge of conspiracy exists so long as the government establishes in

dependent evidence of the conspiracy. *United States v. Jones,* 542 F.2d 186, 202 n.31 (4th Cir. 1976). In addition, upon joining the conspiracy, earlier statements made by co-conspirators after inception of the conspiracy become admissible against the defendant. *United States v. LeRoux,* 738 F.2d 943, 949-50 (8 Cir. 1984). The evidence of consummation of deals outside Jackson's house in the middle of March and the deal arranged between Jackson and agents at the end of March constitute substantial independent evidence that fulfills the government's preponderance burden of proving the conspiracy's existence in March and Jackson's connection to it at that time. Hence, the trial court properly admitted the co-conspirator's statements made in March under Rule 801(d)(2)(E) even though the indictment did not charge Jackson with conspiracy during March. Moreover, even if the evidence did not show Jackson's connection to the conspiracy in March, the taped phone call arranging the April 7 deal constitutes ample independent evidence that Jackson joined the conspiracy in early April making the earlier statements of co-conspirators admissible against him.

Jackson further argues that the district court failed to provide adequate limiting instructions to the jury to limit their consideration of the out of court statements. The district court instructed the jury that where the statements established acts of Jackson occurring prior to the acts for which he was charged, the jury must limit the use of the evidence to issues of intent. The instruction is consistent with Fed. R. Evid. 404(b), and Jackson was not entitled to further instructions limiting the use of the properly admitted statements.

III

Jackson next alleges that the trial court erred in deny-

ing his motion for a bill of particulars to obtain thenames of persons that the government alleged to be in the conspiracy and his motion in limine to exclude hearsay statements of persons not specifically charged as, or alledged to be co-conspirators. Although grant of a bill of particulars lies in the discretion of the trial court, the defendant may show abuse of discretion in denying the motion by providing unfair surprise. *See Wong Tai v. United States,* 273 U.S. 77, 82 (1927). Jackson alleges unfair surprise in that the court admitted hearsay statements of Preston Jackson even though Jackson lacked notice that the statements would be used. Jackson's claim of surprise is not believable in view of the fact that Preston, a near kinsman and undisputed compatriot of Jackson's, had recently been convicted on federal charges arising our of the same transactions leading to Gary Jackson' s convictions. Moreover, Jackson makes no showing that any surprise that occurred prejudiced him. Hence, we find no abuse of discretion in denial of the motion for teh bill of particulars. Jackson was not entitled to exclusion of out of court statements of co-conspirators not specifically charged as or alleged to be co-conspirators because Rule 801(d)(2)(E) does not require that formal charges of conspiracy exist. *See Jones,* 542 F.2d at 202 n.31. Hence, the trial court properly denied Jackson's motion in limine.

IV

Jackson next argues that the government violated Fed. R. Crim. P. 16(a)(1)(A) in failing to disclose after a request for discovery statements of co-conspirators that contained statements that he made and statements that incriminated him. By its terms, Rule 16(a)(1)(A) requires the government to disclose oral statements of the defendant to be introduced at trial only if the defendant made the statement to a

government agent during interrogation. *See United States v. Percevault,* 490 F.2d 126, 131 (2d cir. 1974). Moreover, Rule 16(a)(1)(A) in no way encompasses statements fo co-conspirators simply because the statement implicated the defendant, and 18 U.S.C. § 2500(a) expressly makes statements of witnesses including co-conspirators, not discoverable if the witness is a prospective government witness. *See, id.* Nevertheless, courts have found that statements of co-conspirators must be disclosed if the government does not intend to call the co-conspirator as a witness. *See, United States v. Konefal,* 566 F. Supp. 698, 705-07 (N.D.N.Y. 1983) (cases in accord cited therein).

We agree with the reasoning of the court in *Konefal* that the defendant is entitled to disclosure of statements of co-connspirators if the co-conspirator is not a prospective government witness and disclosure does not unnecessarily reveal sensitive information. *See* 566 F. Supp. at 706-07. Rule 802(d)(2)(E) permits the government to introduct the statements of a co-conspirator against the defendant as if they were his own, and protection against unfair surprise justifies a disclosure requirement. Although Rule 801(d)(2)(E) makes the co-conspirator's statements non-hearsay, the out of court statements nonetheless lack the indicia of reliability that attaches to testimony given in the solemn atmosphere of a court by a witness subject to cross examination. By giving the defendant notice of the statements, he may properly investigate their origina nd if grounds exist, attemp to discredit the statements.

Moreover, the policies behind 18 U.S.C. § 3500(a), which limits discovery of statements, are not applicable because there is a lesse risk of intimidation of the witness or efforts to suborn perjury when the hearsay declarant is not a prospective witness. *See, Percevault,* 490 F.2d at 131 (discussing policies behind the Jencks Act). The policy of

protecting witnesses who agree to aid the government from intimidation is but tenuously implicated, and even if disclosure led the defendant to secure false testimony from teh declarant, the jury would not likely be misled since the government could impeach with prior inconsistent statements. In these circumstances, the risk of perjury is outweighted by the risk of unfair surprise to the defendant.

However, the discovery violation in this case does not entitle Jackson to reversal because he does not demonstrate prejudice. *See United States v. Jennings,* 724 F.2d 436, 444 (5th Cir. 1984). Preston Jackson was convicted before Jaclson went to trial, so Jackson knew or could have discovered the nature of the statements that the government would present. More importantly, Jackson makes no showing that he could have discredited teh out of court statements properly admitted against him had he received prior disclosure of their contents. Hence, no sanction for the discovery violation is warranted.

V

Finally, Jackson contends that the government violated his rights of compulsory process and confrontation in refusing to produce Preston Jackson, who was in federal prison in Memphis, Tennessee, so that Preston could testify at trial. Jackson also challenges denial of his petition for habeas corpus ad testificandum to secure Preston Jackson's presence that he filed after the trial began.

Ordinarily, if the government refuses to produce a witness in its custody who is necessary to the defence, and the court denies habeas, teh defendant's compulsory process may stand violated. *See, Clark v. Blackburn,* 632 F.2d 531, 533-35 (5th Cir. 1980). Bur we hold that no violation occurred here.

The district court's power to issue the writ of habeas

corpus ad testificandum derives from 28 U.S.C. § 2241(c)(5), which permits the court to order a prisoner brought into court when necessary. *Spears v. Chandler,* 672 F.2d 834, 835 (11th Cir. 1982). The issuance of the writ lies in teh discretion of the court. *United States v. Leon,* 679 F.2d 534,539 (5th Cir. 1982). Wh hold that when, as here, the defendant fails to petitionf or this habeas relief until after the beginning of the trial, teh trial judge has discretion in ruling on the petition comparable to his discretion in ruling on a motion for a continuance to secure a witness during trial, for the effect and purpose of the petition is the same as the motion for continuance. The defendant is not entitled to special consideration by the fortuity that the witness he seeks to secure is in custody.

The trial court abuses its discretion in not halting proceedings to allow the defendant to secure a witness when the witness appears to be prepared to give exculpatory testimony and the defendant has made reasonable efforts to secure the witness's presence before trial. *See, Shirley v. North Carolina,* 528 F.2d 819, 822-23 (4th Cir. 1973). Jackson failed to show that the trial court abused its discretion because no evidence exists in the record to show that Preston Jackson was prepared to give exculpatory testimony. Moreover, since Preston Jackson was convicted prior to teh beginning of Jackson's trial, Jackson either knew or could have known of possible exculpatory testimony that Preston might give, yet he did not attempt to secure Preston's presence prior to trial. Hence, we find no violation of Jackson's compulsory process right.

AFFIRMED.

WILKINSON, Circuit Judge, concurring separately:

I cannot agree with the court that a defendant may demand pre-trial discovery of a co-conspirator's statement whenever the government does not intend to call the co-conspirator to testify. I would prefer not to reach this issue, given the absence of any prejudice to the defendant, but as the majority elects to do so, I offer a brief response. First, the majority belittles the risk that a declarant co-conspirator will be harassed or intimidated. Next, it converts a perceived danger of "unfair surprise" to defendants into an inflexible requirement of pre-trial disclosure. The result is a requirement of pre-trial disclosure. The result is a regrettable turn toward rigidity in the law of criminal discovery.

I

I do not share the majority's conclusion that the interest in protecting a co-conspirator declarant from intimidation is but "tenuously implicated." In expressing such concerns, I doubt that I am seeing ghosts. The stakes for those accused are high. The co-conspirator's statement materially assists the prosecution's case. The co-conspirator, moreover, it well known to those on trial. The dangers of threat or bribe are acute in the conspiracy context, where mutual associats, not all of whom may have been arrested, share common interests in pressing a declarant to disown whatever damaging remarks he may have made.

"Fear of intimidation of witnesses and concern over efforts to suborn perjury were not flights of fancy by those who drafted Rule 16." *United States v. Percevault,* 460 F.2d 126, 131 (2d Cir. 1974). These fears fo not evaporate when the statement is to be introduced through the testimony of federal agents pursuant to the co-conspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E). However admitted, the adverse impact of the co-conspirator's remarks

remains, along with the incentive to defendants to have them recanted. It is true, as the majority notes, that testimony secured by a defendant repudiating the co-conspirator's prior incriminating declaration can be impeached. This is equally true, however, where the co-conspirator testifies, yet the possibility of the government's impeaching its own witness, Fed. E. Evid. 607, did not lead the drafters of the Hencks Act to adopt the result the majority reaches here.

It is no answer to say that a prosecutor concerned about coercion may seek from teh trial court a protective order under Fed. R. Crim. P. 16(d)(1), which provides that discovery otherwise availabe be "denied, restricted, or deferred" upon a sufficient showing. Here, the government would bear the burden of showing within a conspiracy the likelihood of untoward pressure it may not even be in a position to detect. Moreover, themajoriyt's calculation that "the risk of unfair surprise" to defendants outweights "the risk of perjury" in 801(d)(2)(E) situations renders the government's chances on a 16(d)(2)(E) situations renders the government's chances on a 16(d) motion problematical at best.

Indeed, nothing in Fed.R.Crim.P. 16 authorizes the majority's result. Rule 16(a)(1)(A) requires the government to disclose to the defendant his own statements which the government intends to offer at trial and which were made to a person then known to the defendant as a government agent. It does not, as the majority acknowledges, confer a right to discover the statements of anyone else, and in particular it make sno mention of co-conspirators. To attempt, as some courts have done, *see, e.g., United States v. Konefal,* 566 F.Supp. 698, 706 (N.D.N.Y. 1983); *United States v. Fine,* 413 F. Supp. 740, 742, (W.D. wis. 1976), to justify discovery of the co-conspirator's statement as a "vicarious

admission" of the defendant is to make one person out of two and beg the question of undue pressure which may result.

II

The respective interests of prosecution and defense can be amply accommodated short of the majority's result. The court errs in linking the danger of "unfair surprise" with a requirement of pre-trial disclosure. Traditionally, these have been distinct in the law of criminal discovery. Courts have been able to guard against the danger of unfair surprise to defendants without opening statements to discovery upon request.

Pre-trial disclosure of prior statements of government witnesses would appear as necessary to prevention of "unfair surprise" as discovery of the statements of declarant co-conspirators. Yet the Jencks Act, 18 U.S.C. § 3500(a), expressly disallows discovery of witness statements "until said witness has testified on direct examination in the trial of the case." Under § 3500(b) and (c), a defendant is entitled to receive the contents of any statement relating to the subject of testimony once given, and the trial court may grant a continuance to allow the defendant reasonable time to prepare for use of the statement at trial.

I see no reason not to apply that same appraoch here. In the great majority of cases, whether the statement be that of a prospective witness or a declarant co-conspirator, the government will disclose early in the itnerest of simple fairness, in the hope of achieving a favorable plea bargain, or from a desire to avoid interruption of the trial. In those cases where concern about intimidation prompts the prosecution to delay disclosure until the co-conspirator statement is admitted, the court can grant the defendant a reasonable continuance to assess the co-conspirator state-

ment in the government's possession and to prepare to respond. Under any scenario, there will be no "unfair surpirse."

III

I share with the majority the belief that a criminal trial must be a sober quest for truth and justice and not a game of evidentiary hide and seek. The real question here is a rather speculative one: whether it is more likely that prosecutors will abuse a Jencks-type device to delay disclosure of co-conspirator statements unjustifiably or whether defendants will pursue pre-trial discovery to pressure co-conspirators into perjured testimony. Because the balance of bad faith does not for me fall so heavily against the government, I write, with respect, this separate statement of my views.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-5156

UNITED STATES OF AMERICA, APPELLEE

v.

GARY JACKSON, A/K/A "ROE", APPELLANT.

Appeal from the United States
District Court for the
Eastern District of North Carolina,
at Fayetteville,
W. Earl Britt, Chief District Judge.

(CR 84-12-01-CR-3)

The appellant's and appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petitions for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petitions for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips, with the concurrence of Judge Butzner and Judge Wilkinson as to appellant's petition. Judge Wilkinson would grant appellee's petition.

FOR THE COURT,

John M. Greacen
Clerk

CERTIFICATE OF SERVICE

Counsel for Defendant hereby certifies that three (3) copies of the foregoing Petition for Writ of Certiorari, produced under Rule 33 of the Revised Rules of the Supreme Court of the United States of America in accordance with Rule 28 of the Revised Rules of the Supreme Court of the United States. Further counsel certifies that such service was accomplished by mail, consisting of depositing the copies of the document in a United States post office at Fayetteville, North Carolina, with first class postage prepaid, addressed to the Honorable Rex E. Lee, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.

This the 26th day of July, 1985.

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